83-622

No. 83_____

IN THE

Supreme Court of the United States

October Term, 1983

JORGE S. ZUNIGA, M.D., and
GARY R. PIERCE, M.D.,
Petitioners,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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QUESTION PRESENTED

I

TO ENSURE COMPLETE CONFIDENTIALITY WITHIN THE PSYCHOTHERAPIST-PATIENT RELATIONSHIP, SHOULD THE PSYCHOTHERAPIST-PATIENT PRIVILEGE PROTECT THE PATIENT'S IDENTITY AS WELL AS THE DATES AND NUMBER OF PSYCHOTHERAPY SESSIONS FROM DISCLOSURE?

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Jorge S. Zuniga, M.D. and Gary R. Pierce, M.D. by and through their respective attorneys Gordon S. Gold and Neil H. Fink, petition herein for a Writ of Certiorari to review the decision of the United States Court of Appeals for the Sixth Circuit affirming the lower Courts' judgments of contempt.

OPINION BELOW

The Opinion of the Sixth Circuit Court of Appeals filed August 3, 1983, affirming the District Courts' judgments of contempt, is reprinted in full as Appendix A hereto. That opinion has not, as of this writing, been published.

JURISDICTION

The Opinion and Order appealed from was filed August 3, 1983. The jurisdiction of this Court is invoked under 28 USC Section 1254 (1).

STATEMENT OF THE CASE

Two cases are consolidated herein for purposes of this Petition for Writ of Certiorari. Although the issue to be resolved is identical in both cases, the procedural aspects of each case differ and will therefore be treated separately below.

Dr. Zuniga

Dr. Jorge Zuniga is a licensed psychiatrist, practicing in the State of Michigan. On March 30, 1982 the Grand Jury issued a subpeona to Dr. Zuniga, or an authorized custodian of the records, requesting production of the following records for 268 named patients:

1. Redacted copies of patient files indicating patient name, date of service, type of psycho-therapy session rendered (i.e., full, half, brief) and billed.
2. Original ledger cards for patients.
3. Original of any intra-office forms in support of service rendered and date thereof.

On April 2, 1982, Dr. Zuniga moved to quash the subpeona. On May 3, 1982, the Honorable Philip Pratt denied the motion but ordered that only 75 of the 268 records need be produced.

On June 18, 1982 the government asked the District Court to reconsider its ruling and proposed that the records for all 268 patients be produced for 21 specific dates rather than for the entire five year period. Judge Pratt, however, refused to follow the government's recommendation, believing that it had proposed an entirely new subpeona.

On July 15, 1982, the Grand Jury issued a second subpeona which was basically the same as the first except that it ordered production of the 268 patient records for only 21 specific dates.

On August 11, 1982, Dr. Zuniga filed a motion to quash the second subpeona. This motion was denied on September 30, 1982. Dr. Zuniga continued to resist the mandate of the subpeona and, in response to his resistance, the government filed a motion to show cause why Dr. Zuniga should not be held in contempt. On November 4, 1982, Judge Pratt found Dr. Zuniga in contempt of court and remanded him to the custody of the United States Marshal until such times as Dr. Zuniga purged himself of the contempt. Petitioner was granted a stay of execution pending appeal to the Sixth Circuit Court of Appeals.

Thereafter, Petitioner appealed Judge Pratt's order placing him in contempt of court. On August 3, 1983, a panel consisting of Circuit Judges Engel, Krupansky and Brown affirmed the decision of the District Court. On September 6, 1983, the Court of Appeals entered its Order Staying Mandate pending application to this Honorable Court for Writ of Certiorari.

Dr. Pierce

On November 24, 1980, the Grand Jury issued a subpoena ordering Dr. Gary Pierce, or an authorized custodian of the records, to produce the following:

> Patient files, progress notes, ledger cards, copies of insurance claim forms and any other documentation supporting dates of service rendered and identity of patient receiving said service for the years 1978 and 1979 for the following individuals and all dependents thereof covered under the individuals' Blue Cross/Blue Shield contract:

The names and addresses of 18 individuals were listed thereunder.

Dr. Pierce, a licensed psychiatrist, moved to quash this subpeona. A hearing on the motion was had before the Honorable Patricia J. Boyle, and on February 26, 1981, Judge Boyle issued an order denying the motion to quash. However, the Court held that the records would be redacted of information other than the data showing the patient's name and the fact and time of treatment.

The Grand Jury then issued a subpeona commanding Dr. Pierce to appear before it on April 8, 1982. Counsel informed the Assistant United States Attorney that Dr. Pierce would respectfully refuse to comply with the terms of the subpeona. As a result, Dr. Pierce was excused from appearing before the Grand Jury.

On that same date, the Government filed a motion to show cause why Dr. Pierce should not be held in contempt. A hearing was held subsequent to which the Court found Dr. Pierce in civil contempt and remanded him to the custody of the United States Marshal until such time as he purged himself of the contempt. The Court stayed execution of the order pending appeal.

In an appeal consolidated with Dr. Zuniga's appeal, Dr. Pierce sought review of Judge Boyle's decision in the Sixth Circuit Court of Appeals. In an opinion dated August 3, 1983, the Court affirmed the District Court's order. On September 6, 1983, the Court of Appeals entered its Order Staying Mandate pending application to this Honorable Court for Writ of Certiorari.

REASONS FOR GRANTING THE WRIT

This Petition presents an important question of Federal law over which the Courts of Appeal are of divided opinion; that is, the nature and scope of the psychotherapist-patient privilege under Federal law. The Sixth Circuit's opinion in this matter strongly supported recognition of a psychotherapist-patient privilege under Federal law. However, Petitioners take exception to the Court's opinion to the extent that it failed to properly recognize that both the fact of consultation and patient identity must be protected from compelled disclosure. Petitioners submit that disclosure of identity has traumatic and stigmatizing effects on patients' lives and the effectiveness of their therapy, and further, deters people from obtaining mental health services.

The psychotherapist-patient privilege has received varying treatment in the Federal courts ranging from refusal to recognize the psychotherapist-patient privilege as a privilege distinct from the general physician-patient privilege, to extension of the psychotherapist-patient privilege as an element of constitutionally guaranteed right to privacy, with consequent prohibitions against disclosure of patient identity and confidential communications. Petitioners submit that the nature and scope of the psychotherapist-patient privilege under Federal law is a substantial and important question of

Federal law which should be settled by this Court. A uniform standard in the Federal courts is necessary to encourage the development of mental health treatment as well as to promote the retention of psychotherapeutic services by the mentally ill.

In order to encourage trust and open communication in relationships deemed important to the well-being of our society, confidential communications in certain relationships are protected from disclosure. Most notable among these relationships are the attorney-client, clergyman-penitent, husband-wife, and doctor-patient relationships. Petitioners Jorge S. Zuniga, M.D. and Gary S. Pierce, M.D. submit that the psychotherapist-patient relationship, with its unique dependency on confidentiality for success, as well as the social stigma attaching to those patients utilizing psychotherapy services, requires recognition of a psychotherapist-patient privilege extending to both confidential communications and to the identity of patients. Petitioners acknowledge that non-disclosure of identity, or the fact of consultation, is not normally an element of privilege. However, they submit that the psychotherapist-patient relationship is unlike other privileged relationships, and as such, the privilege afforded this relationship should be structured to effectively preserve the depth of the confidences disclosed therein.

The psychotherapist-patient relationship requires unreserved self-revelation and, in consequence, assurance of complete confidentiality. The nature of the relationship has been described by leaders in the field as follows:

> "It has accurately been noted that there is hardly a situation in the gamut of human relations where

> one human being is so much subject to the scrutiny and mercy of another human being as in the psychodiagnostic and psychotherapeutic relationship. Implicit in the nature and processes of psychodiagnosis and psychotherapy is a profound prying into the most hidden aspects of personality and character, a prying often productive of disclosure of secrets heretofore unknown, even to the conscious mind of the patient himself . . ."[1]

Thus, due to the purposes and theory of psychotherapy, the psychotherapist-patient relationship, unlike other privileged relationships, consists almost entirely of confidential disclosures. By making free disclosure of both embarrassing and often humiliating thoughts and sentiments, while perceiving the therapist's carefully calculated responses, the patient learns the inaccuracies of his own thought processes and is able to develop a new and sound perception of himself and others. If the psychotherapy profession is to fulfill its medical responsibility to its patients, a privilege to those participating in the relationship is necessary.

The specialized psychotherapist-patient relationship is significantly distinguishable from the relation between doctors and patients generally or other privileged relationships because of the stigma which attaches to

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[1] Louisell, *The Psychologist in Today's Legal World*: Pt. II, 41 Minn. L. Rev. 731, at 744-45 (1957); Fisher, *The Psychotherapeutic Professions and the Law of Privileged Communications*, 10 Wn LR 609 at 619-620 (1964). See e.g.: Brenner, *An Elementary Textbook of Psychoanalysis*, 8 (1957); Hall & Lindsey, *Theories of Personality*, 58-59 (1957); Jung, *Contributions to Analytical Psychology*, 286, 293 (1928).

persons seeking mental health services. McCormick, *Evidence* § 99 at 213 n. 9 (Cleary, 2nd Ed. 1972). The injurious effect of patient identity disclosure is felt not only within the psychotherapist-patient relationship itself, but also in the independent lives of the patients. Persons receiving psychotherapy are perceived in a "tainted" light by their peers, employers and third persons in general. This is ably illustrated by the life of Vice Presidential candidate Eagleton; when the press disclosed that he had been consulting a psychiatrist, his entire political career was destroyed. Eagleton was forced to withdraw from the candidacy because of the mere fact that people knew he had retained the services of a psychiatrist, not because they knew the intimacies of what was disclosed during therapy sessions.

The stigmatizing effect of public disclosure of patient identity on the psychotherapist-patient relationship has been compared to disclosure of identity in other privileged relationships:

> "There is a stigma attached in our society to visiting a 'head-shrinker.' There is certainly something of a stigma attached in juvenile circles to being counseled by a school counselor or psychologist, and in the lower classes to giving information to social workers or paying visits to psychotherapeutic agencies. If this information is disseminated, one is hazed by one's friends, eyed askance by one's employer, and, in higher intellectual circles, a reverse twist, censured for seeking 'status by analysis.' One may get married, go to the confessional, consult a lawyer or go to the doctor without qualms about the reactions of others — but there are real psychological barriers to be overcome before one

> will seek out the services of a psychotherapist in any of his many functions." Fisher, *The Psychotherapeutic Professions and the Laws of Privileged Communications*, 10 Wn LR 609, 622 (1964).

Disclosure of identity not only victimizes patients by subjecting them to public ridicule and interfering with their abilities, at least subconsciously, to disclose all confidences to the psychotherapist, it also deters persons in need of help from seeking help. Unlike physical illness, mental illness is infrequently terminal. It permits a person to function although perceiving the world in a severely disturbed manner. As a consequence, persons in need of treatment who fear disclosure of the fact of treatment and its repercussions, will avoid needed treatment. This not only injures the mentally ill person but it also injures society as a whole, since society is deprived of his healthful participation and subjected to his potentially violent outbreaks.

Studies in the field of mental health indicate that the chance that one will be stricken with mental illness by the age of 45 is approximately 1 in 20, and by the age of 65 the statistics increase to approximately 1 chance in 10.[2] In light of these figures and the potential gravity of injuries inflicted upon patients, Petitioners submit that the scope of the psychotherapist-patient privilege is a question of substantial Federal importance which should be settled by this Court.

Moreover, as indicated in the Court of Appeals' opinion, (Appendix A, page A-1) the issue of the psychotherapist-patient privilege has received varying treatment among the Federal courts. The psycho-

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[2] *Id.* 614, n. 8.

therapist-patient relationship was addressed in *Lora* v *Board of Education*, 74 FRD 565 (ED NY 1977). In *Lora*, Plaintiffs challenged a program seeking to identify and separate emotionally handicapped children in a public school system. Plaintiffs alleged that standards for identification, evaluation and educational placement for these emotionally handicapped youngsters were unconstitutionally vague and overbroad and were being applied in a capricious, arbitrary and racially discriminatory manner.

In order to support these contentions, Plaintiffs requested production of 50 randomly selected psychodiagnostic and referral files which had been used to determine whether a student ought to be separated from the rest of the student population. Weighing the competing interests, the court ultimately ordered disclosure of the files but emphasized that one of the major factors militating toward disclosure was the absence of identification of the individuals in the materials. The court wrote, "[a]s we have seen, it is identity, rather than anonymous communications, that patients generally wish to have shielded from exposure." *Id.*, at page 587.

In *Hawaii Psychiatric Society* v *Ariyoshi*, 481 F. Supp. 1028 (DC Haw, 1979), the court expanded the scope of the privilege beyond that in *Lora*, and held that the psychotherapist-patient privilege as well as constitutionally guaranteed rights to privacy, prohibited disclosure of patient histories and therapeutic notes. In particular, the Plaintiff challenged a warrant seeking records relating to Medicaid beneficiaries, including therapeutic notes, patient history forms, medical records and reports and diagnoses. The warrant was issued pursuant to a state statute designed to curb fraud and

abuse in the Medicaid program. The court, following the rationale in the line of cases represented by *Roe* v *Wade*, 410 US 113 (1973) and *Loving* v *Virginia*, 388 US 1 (1969), reasoned as follows:

> "An individual's decision whether or not to seek the aid of a psychiatrist . . . falls squarely within the bounds of this cluster of constitutionally protected choices . . . the Supreme Court has consistently been concerned with protecting individuals against governmental intrusion into matters affecting the most fundamental personal decisions and relationships . . . constitutionally protected privacy must, at a minimum, include the freedom of an individual to choose the circumstances under which, and to whom, certain of his thoughts and feelings will be disclosed . . ." At page 1038.

The court then emphasized the irreparable harm that the patients would suffer should the information be disclosed:

> "The issuance of warrants . . . may inhibit the willingness of individuals to seek psychiatric care and to be candid with their psychiatrist, and the ability of the psychiatrist to provide the best possible analysis and treatment. The failure of the individual to seek care may result in serious irreversible injury to that individual." *Id.* at 1052.

Accordingly, the subpoena was quashed and the court ordered the return of all records searched and seized under the warrant.

The Ninth Circuit has similarly recognized the existence of the psychotherapist-patient privilege in

Ceasar v *Mountanos*, 542 F.2d 1064 (9th Cir 1976). While recognizing the privilege, the facts in this case required the court to hold that the privilege did not prevent the psychotherapist from testifying regarding the relationship since the patient had specifically placed his treatment in issue.

Recently the Seventh Circuit addressed the issue of the scope of the psychotherapist-patient privilege in the case of *In re Pebsworth*, 705 F.2d 261 (7th Cir 1983). This case, which was relied on heavily by the Sixth Circuit in its decision of the case at bar, concerned a grand jury investigation of an Illinois psychotherapist for possible Blue Cross fraud. The Defendant-doctor attempted to resist the grand jury subpoena requesting the names of his patients and the dates of their visits. While the Seventh Circuit held that the psychotherapist-patient privilege existed regarding confidential communications between psychotherapist and patient, the court held that the privilege did not prevent disclosure of the names of patients who had previously submitted their names to Blue Cross for collection purposes.

In a concurring opinion, Judge Gray wrote that he did not believe that patients had consented to disclosure of their names or assented to participation in a grand jury investigation by merely submitting claims to their insurance carrier for psychotherapy services. The Judge reasoned:

> "Thorough reliance upon the confidential relationship with a doctor is particularly important to a psychiatric patient, because of the very nature of the problem that brings the two together. Such a patient may, with reluctance, recognize the practical necessity for disclosure of

> his identity and perhaps other information to the insurance carrier. But it by no means follows that because of this he may be deemed to have consented to become involved in a criminal investigation. It is well established that a patient or a client may consent, tacitly or otherwise, that a secretary or a nurse or a paralegal may be exposed to his disclosures, without destruction of the relevant privilege of confidentiality. This also stems from practical necessity. I think the same should be true with respect to medical insurance personnel." At page 264.

Not only is there divergence in the Circuits regarding the scope of the psychotherapist-patient privilege, but at least two Circuits have refused to distinguish between the psychotherapist-patient relationship and the physician-patient relationship, and have thereby failed to recognize the psychotherapist-patient privilege. See: *United States* v *Meagher*, 531 F.2d 752 (5th Cir), *Cert denied* 429 US 853 (1976) and *United States* v *Lindstrom*, 698 F.2d 1154 (11th Cir 1982).

CONCLUSION

Society clearly has a great interest in promoting the mental health of its members and in protecting the fundamental constitutional right to privacy. To fulfill this laudable goal, complete confidentiality in the psychotherapist-patient privilege is essential. It is imperative that the Federal Courts uniformly recognize and apply this privilege. The Federal standard must extend not only to confidential communications but to the identity of patients as well because the only means of insuring that persons in need of mental health care will be unafraid to obtain treatment is to insure the

confidentiality of both their decision to retain services as well as the disclosures made by them during treatment.

Wherefore, it is respectfully requested that this Honorable Court grant the Petition for Writ of Certiorari to review the substantial questions posed herein.

Respectfully submitted,

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Dated: October 4, 1983

APPENDICES

APPENDIX A

OPINION

(United States Court of Appeals — Sixth Circuit)

(In Re: Supoena Served Upon Jorge S. Juniga, M.D., et al.; In Re: Subpoena Served Upon Gary R. Pierce, M.D., et al. — Nos. 82-1906/82-1907/82-1964)

Decided and Filed August 3, 1983

Before: Engel and Krupansky, Circuit Judges, and Brown, Senior Circuit Judge.

Krupansky, Circuit Judge.

These are consolidated appeals from two orders of separate courts of the Eastern District of Michigan adjudging appellants, Jorge S. Zuniga, M.D. (Zuniga) and Gary S. Pierce, M.D. (Pierce), in civil contempt for failing to appropriately respond to subpoenas duces tecum issued by the grand jury of that district. In both cases the grand jury sought records relevant to an investigation of alleged schemes to defraud in billings submitted to Michigan Blue Cross-Blue Shield.

Pierce

Pierce is a practicing psychiatrist licensed to practice medicine in the State of Michigan. Pierce's practice is organized as a professional corporation. On November 24, 1980 a subpeona duces tecum was issued by the

Grand Jury for the Eastern District of Michigan commanding Pierce, or an authorized custodian of records, to appear and produce the following records:

> Patient files, progress notes, ledger cards, copies of insurance claim forms and any other documentation supporting dates of service rendered and identity of patient receiving said service for the years 1978 and 1979 for the following individuals and all dependants thereof covered under the individuals' Blue Cross/Blue Shield contract:

The names and addresses of 18 persons were listed thereunder.

The subpoena directed Pierce to appear before the grand jury on December 11, 1980. On December 3, 1980 he filed a motion to quash the subpoena in the district court. A hearing on the motion was conducted before the Honorable Patricia J. Boyle, and on February 26, 1981, Judge Boyle issued an orer denying the motion to quash. The district court, in accordance with the Gover ment's concession, held that the records to be produced would be redacted of information other than the data showing the patient's name and the fact and time of treatment.

Pierce persisted in his refusal to produce the subpoenaed documents and the Government filed a motion to show cause why he should not be held in contempt. Another hearing was conducted subsequent to which the court found Pierce in civil contempt and remanded him to the custody of the United States Marshal until such time as he was prepared to purge himself of contempt by compliance with the subpeona. The court stayed execution of the order pending this appeal.

Zuniga

Zuniga is also a practicing psychiatrist licensed to practice medicine in Michigan and his practice is organized as a professional corporation. On March 30, 1982, the Grand Jury for the Eastern District of Michigan issued a subpoena commanding Zuniga, or an authorized custodian of records, to appear before the grand jury and produce the following records:

> with respect to each of the followed (sic) names on the list attached, the following documents:
>
> 1. Redacted copies of patient files indicating patient name, date of service, type of psycho-therapy session rendered (i.e., full, half, brief)[1] and billed.
> 2. Original ledger cards for patients.
> 3. Original of any intra-office forms in support of service rendered and date thereof.

The attached list included the names of 268 persons.

On April 2, 1982, Zuniga filed a motion in the district court to quash the subpoena. A hearing was conducted before the Honorable Phillip Pratt and on May 3, 1982, Judge Pratt denied the motion but limited the subpoena to the production of records for 75 individuals. Judge Pratt also confined the scope of the subpoena to the five preceding years.

On June, 18, 1982, the Government moved the district court to reconsider its May 3rd ruling. The Government proposed to limit the scope of the subpoena to 21 specific

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[1] The billing procedure under which Zuniga is compensated is allegedly structured in time segments — full session, 50 minutes; half session, 25 minutes; brief session, 20 minutes. Govt's Brief at 5.

dates rather than a five year period. The Government requested, however, that the records for all the initially named 268 individuals be produced. The lower court ruled that, in effect, the Government was proposing an entirely new subpoena and refused to grant the request.

In response, the grand jury, on July 15, 1982, issued a second subpoena ordering the production of the following documents:

Bring with you, with respect to the following dates:

May 3, 1978
June 9, 1978
July 17, 1978
July 24, 1978
August 9, 1978
August 10, 1978
August 14, 1978
September 11, 1978
October 9, 1978
October 19, 1978
November 3, 1978
November 20, 1978
December 1, 1978
May 8, 1979
May 23, 1979
June 2, 1979
June 7, 1979[2]

the following documents:

1. Patient appointment books, or pages therefrom, setting forth all patient names and type or length of services rendered by Dr. Zuniga, for both hospital and office services, on the above-listed dates.

2. Patient sign-in sheets for all patients treated by Dr. Zuniga on the above-listed dates.

3. Doctor's daily activity log, book or sheets, listing all patients treated by Dr. Zuniga on the above-listed dates.

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[2] A supplemental subpoena issued September 24, 1982 added four dates to this list.

4. Redacted copies of patient files, indicating patient name, date of service and type of psychotherapy session rendered (i.e. full, half, brief) for the persons listed on pages Two and Three herein.

5. Original patient ledger cards for the persons listed on pages Two and Three.

6. Original of any intra-office forms, records, or memoranda in support of service rendered on the above-listed dates to the persons listed on pages Two and Three herein.

The attached pages included the names of 268 persons.

On August 11, 1982 Zuniga moved to quash the second subpoena, which motion the district court denied on September 30, 1982. Zuniga persisted in his refusal to comply with the subpoena and the Government filed a motion to show cause why Zuniga should not be held in contempt. A hearing was conducted on November 4, 1982 at which Zuniga's counsel indicated that Zuniga would continue to refuse compliance. The district court found Zuniga in contempt and remanded him to the custody of the United States Marshal until such time as Zuniga purged himself of contempt by compliance. Execution of the order was stayed pending this appeal.

These appeals were consolidated pursuant to Rule 3(b), Fed R. App. P., inasmuch as the issues joined and arguments presented in both are identical. Zuniga and Pierce contended below and maintain on appeal that the documents sought by the grand jury are protected from disclosure for three reasons: (1) a psychiatrist-patient privilege, (2) the patients' constitutional privacy right and (3) the Fifth Amendment's privilege against self-incrcmination.

With respect to appellants' first argument, the point of departure for analysis is Rule 501, Fed. R. Ev. That Rule provides:

> RULE 501 — GENERAL RULE
>
> Except as otherwise required by the Constitution of the United States or provided by Act of Congress or in rules prescribed by the Supreme Court pursuant to statutory authority, the privilege of a witness, person, government, State, or political subdivision thereof shall be governed by the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience. However, in civil actions and proceedings, with respect to an element of a claim or defense as to which State law supplies the rule of decision, the privilege of a witness, person, government, State or political subdivision thereof shall be determined in accordance with State law.

Two preliminary observations are necessary. Initially, inasmuch as the subpoenas in issues are the product of a federal grand jury investigation into alleged violations of federal criminal law, questions of privilege are governed by federal law. *United States* v. *Gillock*, 455 U.S. 360, 369 (1980). Second, although the subpoena powers of the grand jury are extremely broad, it may not use its authority to "violate a valid privilege, whether established by the Constitution, statutes, or the common law." *United States* v. *Calandra*, 414 U.S. 338, 447 (1974). Thus, the Court must determine if federal law recognizes a psychiatrist-patient privilege and, if so, whether enforcement of the grand jury subpoenas would violate that privilege.

Rule 501 was substituted by Congress for specific rules of privileges submitted in the rules proposed by the Judicial Conference Advisory Committee on Rules of Evidence and approved by the Supreme Court, 56 F.R.D. 183, 230-261 (1972) (hereafter "Proposed Rules"). Rule 504 of the Proposed Rules embodies a psychotherapist-patient privilege:

PSYCHOTHERAPIST-PATIENT PRIVILEGE

(1) Definitions.

(1) A "patient" is a person who consults or is examined or interviewed by a psychotherapist.

(2) A "psychotherapist" is (A) a person authorized to practice medicine in any state or nation, or reasonably believed by the patient so to be, while engaged in the diagnosis or treatment of a mental or emotional condition, including drug addiction, or (B) a person licensed or certified as a psychologist under the laws of any state or nation, while similarly engaged.

(3) A communication is "confidential" if not intended to be disclosed to third persons other than those present to further the interest of the patient in the consultation, examination, or interview, or persons reasonably necessary for the transmission of the communication, or persons who are participating in the diagnosis and treatment under the direction of the psychotherapist, including members of the patient's family.

(b) General rule of privilege. A patient has a privilege to refuse to disclose and to prevent any other person from disclosing confidential communications, made for the purposes of

diagnosis or treatment of his mental or emotional condition, including drug addiction, among himself, his psychotherapist, or persons who are participating in the diagnosis or treatment under the direction of the psychotherapist, including members of the patient's family.

(c) Who may claim the privelege. The privilege may be claimed by the patient, by his guardian or conservator, or by the personal representative of a deceased patient. The person who was the psychotherapist may claim the privilege but only on behalf of the patient. His authority so to do is presumed in the absence of evidence to the contrary.

(d) Exceptions.

(1) *Proceedings for hospitalization.* There is no privilege under this rule for communications relevant to an issue in proceedings to hospitalize the patient for mental illness, if the psychotherapist in the course of diagnosis or treatment had determined that the patient is in need of hospitalization.

(2) *Examination by order of judge.* If the judge orders an examination of the mental or emotional condition of the patient, communications made in the course thereof are not privileged under this rule with respect to the particular purpose for which the examination is ordered unless the judge orders otherwise.

(3) *Condition an element of claim or defense.* There is no privilege under this rule as to communications relevant to an issue of the mental or emotional condition of the patient in any proceeding in which he relies upon the condition

> as an element of his claim or defense, or, after the patient's death, in any proceeding in which any party relies upon the condition as an element of his claim or defense.

The fact that Congress elected not to accept proposed Rule 504 does not preclude recognition of a psychiatrist-patient privilege. On the contrary, "[t]he Federal Rules of Evidence acknowledge the authority of the federal courts to continue the evolutionary development of testimonial privilege in federal criminal trials 'governed by the principles of the common law as they may be interpreted . . . in the light of reason and experience.' " *Trammel* v. *United States*, 445 U.S. 40, 48 (1980) *quoting* Fed. R. Evid. 501. Congressional enactment of Rule 501 thus, "provides[s] the courts with greater flexibility in developing rules of privilege on a case-by-case basis." *United States* v. *Gillock*, *supra* at 368.

Specifically, with regard to a psychotherapist-patient privilege, the Senate Report to the new Federal Rules stated:

> The committee has received a considerable volume of correspondence from psychiatric organizations and psychiatrists concerning the deletion of rule 504 of the rule submitted by the Supreme Court. It should be clearly understood that, in approving this general rule as to privileges, the action of Congress should not be understood as disapproving any recognition of a psychiatrist-patient, or husband-wife, or any other of the enumerated privileges contained in the Supreme Court rules. Rather, our action should be understood as reflecting the view that the recognition of a privilege based on a confidential relationship and other privileges should be determined on a case-by-case basis.

S. Rep. No. 93-1277, 93d Cong., 2d Sess. (1974) *reprinted in* [1974] U.S. Code Cong & Ad. News 7051, 7059.

Clearly then, the Court has the authority to recognize a psychiatrist-patient privilege. This authority must be exercised with caution. As the Supreme Court has noted "[e]videntiary privileges in litigation are not favored." *Herbert* v. *Lando*, 441 U.S. 153, 176 (1979), and "[w]hatever their origins, these exceptions to the demand for every man's evidence are not lightly created nor expansively construed for they are in derogation of the search for the truth." *United States* v. *Nixon*, 418 U.S. 683, 711 (1974).

The rationale to support a psychotherapist-patient privilege, however, is readily apparent:

> Among physicians, the psychiatrist has a special need to maintain confidentiality. His capacity to help his patients is completely dependent upon willingness and ability to talk freely. This makes it difficult if not impossible for him to function without being able to assure his patients of confidentiality and, indeed, privileged communication. Where there may be exceptions to this general rule . . ., there is wide agreement that confidentiality is a *sine qua non* for successful psychiatric treatment. The relationship may well be likened to that of the priest-penitent or the lawyer-client. Psychiatrists not only explore the very depths of their patients' conscious, but their unconscious feelings and attitudes as well. Therapeutic effectiveness necessitates going beyond a patient's awareness and, in order to do this, it must be possible to communicate freely. A threat to secrecy blocks successful treatment.

Report No. 45, Group for the Advancement of Psychiatry 92 (1960) *quoted in* Advisory Committee's Notes to Proposed Rules, 56 F.R.D. at 242. Similarly, the D.C. Circuit has observed:

> Many physical ailments might be treated with some degree of effectiveness by a doctor whom the patient did not trust, but a psychiatrist must have his patient's confidence or he cannot help him. "The psychiatric patient confides more utterly than anyone else in the world. He exposes to the therapist not only what his words directly express; he lays bare his entire self, his dreams, his fantasies, his sins, his shame. Most patients who undergo psychotherapy know that this is what will be expected of them, and that they cannot get help except on that condition * * * It would be too much to expect them to do so if they knew that all they say — and all that the psychiatrist learns from what they say — may be revealed to the whole world from a witness stand."

Taylor v. *United States*, 222 F.2d 398, 401 (D.C. Cir. 1955) *quoting* Guttmacher and Weihofen, Psychiatry and The Law (1952), p. 272.

Despite these compelling considerations, the psychotherapist-patient privilege has received a mixed reception in the federal courts. *See United States* v. *Lindstrom*, 689 F.2d 1154 (11th Cir. 1982) (indicating privilege does not exist); *United States* v. *Meagher*, 531 F.2d 752 (5th Cir.) *cert. denied* 429 U.S. 853 (1976) (rejecting privilege); *Ramer* v. *United States*, 411 F.2d 30 (9th Cir.), *cert denied* 396 U.S. 965 (1969) (assuming privilege exists); *United States* v. *Witt*, 542 F. Supp. 696 (S.D.N.Y.) *aff'd* 697 F.2d 301 (2d Cir. 1982) (refusing to recognize privilege), *United States* v. *Layton*, 90

F.R.D. 520 (N.D. Cal. 1981) (privilege did not exist at common law and therefore not at federal law); *United States* v. *Brown*, 479 F.Supp. 1247 (D.Md. 1979) (no general federal privilege); *Flora* v. *Hamilton*, 81 F.R.D. 576 (M.D.N.C. 1978) (recognizing privilege to limited extent); *United States* v. *Williams*, 337 F. Supp. 1117 (S.D.N.Y. 1971) (no need to decide status of the psychologist-patient privilege at federal law). In both *Lindstrom* and *Meagher* in which the Eleventh and Fifth Circuits refused to accept the privilege, the courts simply equated it with the physician-patient privilege without analyzing the unique aspects of the psychotherapist-patient relationship. This Court, therefore, does not find these authorities persuasive.

Contrawise, the states have demonstrated their willingness to recognize the privilege and a substantial number, including Michigan have adopted some form of psychotherapist-patient privilege[3] In this regard it

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[3] *See e.g.* Alaska Rules of Court, Rule 504, Ala. Code § 34-26-2; Ariz. Rev. Stat. Ann. § 32-2085; Ark. Stat. Ann § 28-1001, Rule 503; Cal. Evid. Code § 1010 *et seq.*; Colo. Rev. Stat. § 13-90-107(g); Conn. Gen. Stat. Ann. § 52-146c *et seq.*; Delaware Rules of Ev. R. 505; Fla. Stat. Ann. § 90-503; Ga. Code Ann. 38-418; Hawaii Rev. Stat. § 33-626, 1980 Special Rules Pamphlet, Rule 504.1; Idaho Code § 54-2314; Ill. Rev. Stat., ch. 91½ § 801 *et seq.*; Ind. Stat. § 25-33-1-17; Ky. Rev. Stat. § 421.215; La . Rev. Stat. § 13:3734; Maine Rules of Ev. 503; Md. Cts. & Jud. Proc. Code § 9-109; Mass. Gen. Laws Ann. ch. 233 § 233 § 20B; Mich. Comp. Laws Ann. § 330.1750; Minn. Stat. Ann. § 595-02; Miss. Code § 73-31-29; Mo. Rev. Stat. Ann. § 337.055; Mont. Code Ann § 26-1-807; Neb. Rev. Stat. § 27-504; Nev. Rev. Stat. § 49-215 *et seq.*; N.H. Rev. Stat. Ann. § 330 A.19; N.J. Stat. Ann. § 45:14B-28; N.M. Rules of Ev. 503; N.Y. Civ. Proc. Law § 4507; N.C. Gen. Stat. § 8-53.3; N.D. Rules of Ev. 503; Okla. Stat. Ann. Tit. 12 § 2503; Ore. Rev. Stat. § 40.230; Tenn. Code Ann. § 24-1-207; Utah Code Ann. § 58-25-8; Vt. Stat. Ann. Tit. 12 § 1612; Va. Code § 8.01-400.2; Wash. Rev. Code § 18.83.110; Wis Stat Ann. § 905.04; Wyo. Stat. Ann § 33-27-103. *See also* D.C. Code § 14-307.

The foregoing enactments vary in scope and application and no attempt is made here to classify them or the decisions construing the provision and their exceptions. *See generally* 44 A.L.R. 3d 24.

should be noted that, although federal law controls, the Supreme Court has indicated "that the privilege law as developed in the state is [not] irrelevant," and "has taken note of state privilege laws in determining whether to retain them in the federal system." *United States* v. *Gillock*, *supra*, at 369 n.8.

Furthermore, the Court observes that the psychotherapist-patient privilege is advocated by several respected commentators. *See e.g.* Weinstein's Evidence *supra* at ¶ 504 *et seq.*; Slovenko, Psychiatry and a Second Look at the Medical Privilege, 6 Wayne L. Rev. 175 (1960).

In the final analysis, the issue to be decided is "whether the privilege . . . promotes sufficiently important interests to outweigh the need for probative evidence in the administration of criminal justice." *Trammel* v. *United States*, *supra* at 52.

The interests promoted by a psychotherapist-patient privilege are extensive. As the Advisory Committee Notes stated: "confidentiality is the *sine qua non* for successful treatment." 56 F.R.D. at 242, *quoting* Report No. 45, Group For the Advancement of Psychiatry 92 (1960). The inability to obtain effective psychiatric treatment may preclude the enjoyment and exercise of many fundamental freedoms, particularly those protected by the First Amendment. "Mental illness may prevent one from understanding religious and political ideas, or interfere with the ability to communicate ideas. Some level of mental health is necessary to be able to form belief and value systems and to engage in rational thought." Smith, Constitutional Privacy in Psychotherapy, 49 Geo. Wash. L. Rev. 127 (1980).

The interest of the patient in exercising his rights is also society's interest, for society benefits from its members active enjoyment of their freedom. Moreover,

society has an interest in successful treatment of mental illness because of the possibility that a mentally ill person will pose a danger to the community.

This Court has evaluated these interests, taking into account the aforementioned position of the states, the Judicial Conference Advisory Committee and various commentators, and finds that these interests, in general, outweigh the need for evidence in the administration of criminal justice. Therefore, we conclude that a psychotherapist-patient privilege is mandated by "reason and experience." Rule 501.

Having recognized the compelling necessity for the privilege, it remains for the Court to determine its applicability to the instant action. It should be emphasized in this regard that no attempt is made here to define the appropriate perimeters of the privilege. Just as the recognition of privileges must be undertaken on a case-by-case basis, so too must the scope of the privilege be considered. *See, Upjohn Co.* v. *United States*, 449 U.S. 383, 396-97 (1981). This is necessarily so because the appropriate scope of a privilege, like the propriety of the privilege itself, is determined by balancing the interests protected by shielding the evidence sought with those advanced by disclosure.

In the case at bar the information sought by the grand jury subpoenas is limited to the identity of the patients, the dates on which they were treated and the length of the treatment on each date.[4] Appellants acknowlege that, with respect to the attorney-client[5] or physician-patient privilege,[6] these facts do not generally fall within the privilege.

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[4] *See* pp. 2-5 *supra*.

[5] *See* Weinstein's Evidence *supra* at ¶ 503(a) [02].

[6] *See* McCormick, Evidence ¶ 100 (2d ed. 1972).

The appellants argue with the some force, however, that the *identity* alone of the patient must be privileged to maintain the effective psychotherapist-patient relationship the general privilege seeks to promote. *See* Weinstein's Evidence ¶ 504[05]; Slovenko, *supra* at 188 n.46.

It may be true that some persons would be hesitant to engage the services of a psychiatrist if confronted with the prospect that the mere fact of their treatment might become known. This consideration is not insubstantial. However, as indicated, the interest of society in obtaining all evidence relevant to the enforcement of its laws commands a high priority.

In weighing these competing interests, the Court is constrained to conclude that, under the facts of this case, the balance tips in favor of disclosure. The essential element of the psychotherapist-patient privilege is its assurance to the patient that his innermost thoughts may be revealed without fear of disclosure. Mere disclosure of the patient's identity does not negate this element. Thus, the Court concludes that, as a general rule, the identity of a patient or the fact and time of his treatment does not fall within the scope of the psychotherapist-patient privilege. Accordingly, the information sought by the grand jury subpoenas is not privileged.[7]

Even assuming arguendo that the identity of a patient and the times and dates of his treatment were within the scope of the psychotherapist-patient privilege, the patients in this case could not benefit from that

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[7] The Court would hasten to add that this holding does not mean that a court could not, in its discretion, or compelled by considerations of constitutional privacy, *see infra* pp. 18-21, protect the identity of patients. *See generally, Lora* v. *Board of Ed. of City of New York*, 74 F.R.D., 565 (E.D.N.Y. 1977).

privilege. The patients in the case at bar have already disclosed their identities to a third party, i.e. Blue Cross/Blue Shield. In so doing they have waived the privilege to the extent of their disclosure.

A recent case from the Seventh Circuit is directly on point. In *In Re: Pebsworth* No. 82-2726 (7th Cir. April 22, 1983), a federal grand jury issued a subpoena to the authorized representative of Blue Cross/Blue Shield of Illinois commanding production of all records pertaining to an Illinois psychiatrist. The information in the records included the names of the psychiatrist's patients, and enumeration of their visits and, in some cases, the patient's diagnosis.

Blue Cross and the psychiatrist opposed enforcement of the subpoena, urging that enforcement would violate the Illinois psychotherapist-patient privilege. Ill. Rev. Stat., ch. 91½ § 801 *et seq*. The lower court granted enforcement concluding that the patients had waived their privilege by virtue of their consent to disclosure to the insurance carriers.

The Seventh Circuit affirmed, stating, in pertinent part:

> In assenting to disclosure of these documents, a reasonable patient would no doubt be aware that routine processing of reimbursement claims would require these records to be brought into the hands of numerous anonymous employees within a large corporation. While we might well have decided differently if the information sought under the subpoena involved detailed psychological profiles of patients or substantive accounts of therapy sessions, it cannot be said that the subsequent disclosure of such fragmentary data as is involved here as part of the

> insurance company's legal duties in assisting a federal criminal investigation would be beyond the contemplation of the patients' waiver.

Id. Slip Op. at 3-4.

The Seventh Circuit's waiver analysis is sound and fully applicable to the case at bar and this Court adopts that analysis. The Court again emphasizes, *see supra* n.7, that despite the waiver, it is permissible, and even advisable, for the appropriate investigative agency or the court to "take scrupulous measures to ensure that there occurs no unnecessary disclosure of patients' names or diagnoses." *In Re: Pebsworth, supra*, Slip Op. at 6.

In their second argument appellants assert that a constitutional right of privacy attaches to the psychiatrist-patient relationship. There is precedent for this assertion. *See e.g. Caesar* v. *Mountanos*, 542 F.2d 1064 (9th Cir. 1976), *cert. denied*, 430 U.S. 954 (1977); *United States* v. *Layton, supra*; *Hawaii Psychiatric Soc.* v. *Ariyoshi*, 481 F.Supp. 1028 (D. Hawaii 1979); *Lora* v. *Board of Ed. of City of New York, supra*. *See also*, Smith, Constitutional Privacy in Psycho-therapy, *supra*.

Appellants maintain that this constitutional right encompasses their patients' interest in prohibiting disclosure of the personal information sought by the grand jury.[8] Assuming arguendo the existence of such a

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[8] The Court accepts, for purposes of this Opinion, the standing of the appellants to assert this right of their patients. *See generally Planned Parenthood of Central Missouri* v. *Danforth*, 428 U.S. 52 (1972); *Lora* v. *Board of Ed. of New York, supra* at 569.

right[9] it is not absolute.[10]

In *Whalen* v. *Roe*, 429 U.S. 589 (1977), for example, a New York statute which required that the names of all persons who obtained certain drugs be forwarded to the State Department of Health was challenged by patients and physicians charging that the law invaded the patients' privacy rights. The Supreme Court noted that "disclosures of private medical information to doctors, to hospital personnel, *to insurance companies*, and to public health agencies are often an essential part of modern medical practice even when the disclosure may reflect unfavorably on the character of the patient," *Id.* at 603 (emphasis added). Thus, a person *possesses* no reasonable expectation that his medical history will remain *completely* confidential.

This is not to say that a person has no interest in protecting, to some extent, the confidentiality of his medical records. The Supreme Court stressed that the New York statute provided safeguards designed to insure proper utilization of the information and to prevent wholesale public disclosures of the information. The Court commented:

> New York's statutory scheme, and its implementing administrative procedures, evidence a proper concern with, and protection of, the individual's interest in privacy. We therefore need not, and do not, decide any question which might be presented by the unwarranted disclo-

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[9] *Compare, J.P.* v. *DeSanti*, 653 F.2d 1080 (6th Cir. 1981) (no constitutional right to non-disclosure of juveniles' social histories).

[10] *See generally, United States* v. *Lindstrom, supra*, (privacy interest of witnesses in criminal case regarding her psychiatric records must yield to the right of the defense to effective cross-examination).

> sure of accumulated private data — whether intentional or unintentional — or by a system that did not contain comparable security provisions.

Id. at 606-07.

The Supreme Court concluded, balancing the limited invasion of privacy with the State's interest in prohibiting illegal drug activity, that the statute did not effect an unconstitutional infringement of privacy interests.

A recent decision from this Circuit is also instructive. In *General Motors Corp.* v. *Director of the National Institute for Occupational Safety and Health*, 636 F.2d 163 (6th Cir 1980) *cert. denied* 454 U.S. 877 (1981), the National Institute for Occupational Safety and Health (Institute) issued a subpoena duces tecum directing General Motors Corporation to produce the medical records of all employees engaged in a certain manufacturing process at General Motors' plant in Dayton. General Motors sought relief from the subpoena, contending, *inter alia*, that enforcement would invade the privacy rights of the employees.

The district court ordered General Motors to produce the records but authorized deletion of the employees' names and addresses. Both parties appealed.

This Court, while acknowledging the privacy rights of the employees, concluded that the Institute was entitled to enforcement of its subpoena including the request for specific names. The Court was confident that the district court would formulate and implement appropriate measures to protect "the constitutional rights of the individuals involved." *Id.* at 166

In the case at bar the grand jury is seeking limited information pertaining to individual patients. The identity of these patients, as indicated, is already known to the grand jury from the insurance forms in its possession. Thus, as in *Whalen*, the patients' interest in the privacy of the information is diminished.

Furthermore, the information sought will be protected by the veil of secrecy attending grand jury proceedings. Accordingly, as in *Whalen* and *General Motors Corp.*, the information will be disclosed only to the minimal extent necessary to promote a proper governmental interest and will not be subject to widespread dissemination.[11]

In sum, weighing the slight intrusion on the patients' privacy interest against the need for the grand jury to conduct an effective and comprehensive investigation into alleged violation of the law, the Court concludes that enforcement of the subpoenas does not unconstitutionally infringe on the rights of the patients.

The appellants' final argument needs only brief comment. Appellants assert that the records sought are protected by the Fifth Amendment's privilege against self-incrimination. As indicated, appellants' practices are maintained as professional corporations and the billing records are corporate rather than private records. Thus the Fifth Amendment may not be raised as a bar to production of this information. *Bellis* v. *United States*, 417 U.S. 85 (1974).

In accordance with the foregoing, the Court concludes that the appellants' refusal to comply with the grand jury subpoenas was unjustified, and the lower courts' judgments of contempt were therefore proper. Accordingly, judgments are hereby affirmed.

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[11] The Court need not presently decide what procedures will be appropriate should the grand jury investigation lead to criminal proceeding wherein the Government would seek to utilize the information as evidence.

APPENDIX B

ORDER

(United States District Court —
Eastern District of Michigan —
Southern Division)

(In Re: Grand Jury Subpoena Served Upon Jorge S. Zuniga, M.D., Or Authorized Custodian Of Records, 25865 West Twelve Mile Road, Southfield, Michigan — Misc. No. 82-242)

The United States of America having filed a motion for order to show cause why Jorge S. Zuniga, M.D., should not be held in contempt for failure to comply with an order of this court dated September 30, 1982, and the court having conducted a hearing on this matter at which time both counsel for Jorge S. Zuniga, M.D., and Jorge S. Zuniga, M.D., advised this court that Jorge S. Zuniga, M.D., would respectfully continue to refuse to comply with this court's order of September 30, 1982, counsel stating to this court that said refusal was predicated upon a desire to pursue an appeal therefrom, and the court being fully advised in the premises;

Now, Therefore, It Is Ordered, Adjudged And Decreed that Jorge S. Zuniga, M.D., is in contempt of this court for his failure to comply with this court's order of September 30, 1982, and therefore,

It Is Hereby Ordered that Jorge S. Zuniga, M.D., be remanded to the custody of the United States Marshal for this district until such time as he purge himself of this contempt or until further order by this court, however, upon motion of counsel for Jorge S. Zuniga, M.D., and

counsel's representation that he will pursue an appeal in this matter, execution of this order is stayed pending an appeal therefrom by Jorge S. Zunga (sic), M.D. to the United States Court of Appeals for the Sixth Circuit.

/s/ Honorable Philip Pratt
United States District Judge

Dated: Nov 4, 1982

Approved As To Form:
Gordon S. Gold, Esq.
Attorney for Jorge S. Zuniga

/s/ Richard L. Delonis (P12653)
Assistant United States Attorney

Certification Omitted

APPENDIX C

OPINION AND ORDER DENYING MOTION TO QUASH

(United States District Court —
Eastern District of Michigan —
Southern Division)

(In Re: Subpoena Served Upon Gary R. Pierce, M.D., or Authorized Custodian of Records Walden Mental Health Service, P.C., 26555 Evergreen, Southfield, Michigan — Miscellaneous No. 80-778; Honorable Patricia J. Boyle)

Before the Court is a petition to quash a grand jury subpoena seeking certain documents from Dr. Gary Pierce, a licensed psychiatrist. Specifically, the subpoena calls for:

> Patient files, progress notes, ledger cards, copies of insurance claim forms and any other documentation supporting dates of service rendered and identity of patient receiving said service for the years 1978 and 1979 for the following individuals and all dependents thereof covered under the individuals [sic] Blue Cross/Blue Shield contract: [naming eighteen individuals with addresses].

Petitioner contends that the subpoena must be quashed for three reasons — that it violates the psychiatrist-patient privilege, that it infringes on constitutionally protected privacy interests, and that it is violative of the fifth amendment proscription against compelled self-incrimination. The Government responds that there is no privilege recognized in this context in federal court. With respect to the constitutional

arguments, the Governmentattacks Petitioner's standing to assert the privacy interests of his clients and, addressing the fifth amendment claim, points out that the subpoena is aimed at the professional corporation, not at the doctor individually. On this basis, the Government urges that there can be no problem with testimonial compulsion since a corporation does not enjoy fifth amendment protection.

Addressing first the question of privilege, there are very considerable policy factors militating in favor of a psychoanalyst-patient privilege. The uniquely personal nature of the psychiatrist's relationship to a patient has been described in various precedents, *e.g.*, *Lora* v. *Board of Education*, 74 F.R.D. 565 (E.D. N.Y. 1977), and underlies proposed Federal Rule of Evidence 504, which, though not adopted by Congress, remains a Supreme Court approved Standard against which to consider issues of privilege. *Lora*, *supra* at 569; *Flora* v. *Hamilton*, 81 F.R.D. 576, 578 (M.D.N.C. 1978). Even if a privilege be recognized, however, the scope of its limitation will depend upon the circumstances under which it is invoked. As stated by the court in *Lora*, *supra* at 576,

> Whether claims to privacy and privilege of the sort made here are ultimately rooted in the Constitution or in non-constitutional considerations of public policy, they are in no event absolute. Like rights and interests generally, they are qualified and must be balanced against legitimate and weighty competing private and state interests.

Utilizing such a balancing approach, the court in *Flora*, *supra*, fashioned a method of limited disclosure of the psychiatric file in dispute. By requiring disclosure only at the office of counsel for the plaintiff whose file was in

issue and by providing that thereafter the file would be sealed and filed with the court, the court accounted for competing interests embodied in the privilege while simultaneously forwarding the policy of the Federal Rules of Evidence that they should be construed "to the end that the truth may be ascertained and proceedings justly determined." Fed.R.Evid. 102.

I am persuaded that a psychoanalyst-patient privilege has been recognized in the federal system, particularly where the federal court sits in a state that would, by its common law or statutes, protect the therapeutic relationship. As stated by the court in *Lora*: "If the state holds out the expectation of protection to its citizens, they should not be disappointed by a mechanical and unnecessary application of the federal rule." 74 F.R.D. at 576. Thus, while the federal court is not bound by the state practice, considerations of comity preponderate in favor of formulating a federal rule that at least shows deference to the state policy. Michigan has a broad, statutory physician-patient privilege. Mich. Comp.Laws Ann. § 330.1750 (1980). Certainly the federal rule would not extend to physicians generally, *e.g. United States* v. *Meagher*, 531 F.2d 752, 753 (5th Cir. 1976), but reasonably could be read to embody a psychiatrist-patient privilege.

Also militating in favor of a psychotherapist-patient privilege is the fact that Standard 504, approved by the Supreme Court, speaks strongly for the privilege. Since under Rule 501 the determination of the extent of the privilege, if any, hinges on the "common law as . . . interpreted by the courts of the United States in the light of reason and experience" and the provisions of Standard 504 are the product of careful consideration and reconsideration of the Advisory Committee, it is probable that the privilege would be recognized in some measure at least. The extent of recognition may be

expected to vary in ratio to the degree to which the Standard is an apparent departure from past practice. *See generally* 2 Weinstein's Evidence ¶ 501[03], p. 501-26 — 503-33.

Once a privilege is recognized, a balance between the effect of the privilege and the interest in disclosure of the privileged information must be struck on a case-by-case basis to determine the scope of the privilege. When a criminal investigation is involved, it has been observed that "the need for relevant evidence will weigh much more heavily on the scales than in a civil case." 2 Weinstein's Evidence ¶ 501[3] at 501-31; *see Baker* v. *F & F Investment*, 470 F.2d 778, 783-84 (2d Cir. 1972), *cert. denied*, 411 U.S. 966 (1973); *Carey* v. *Hume*, 492 F.2d 631, 635-36 & n.6 (D.C. Cir.), *cert. dismissed*, 417 U.S. 938 (1974). Thus, well entrenched privileges may be encroached upon in certain circumstances, circumstances which are most apt to arise in criminal prosecutions. *Cf. Branzburg* v. *Hayes*, 408 U.S. 665 (1972) (first amendment interests do not excuse news reporters from responding to grand jury subpoena to answer questions pertinent to criminal investigation).

Based on this analysis, the Court will evaluate the issues at bar on the premise that there does not exist in the federal common law a psychoanalyst-patient privilege. Having so concluded, the balancing process must be undertaken to determine the scope of the privilege in the instant case. Presently, the Government is in the midst of a secret grand jury investigation which is proceeding on the theory that Petitioner, and perhaps certain ones of his patients, engaged in an illegal scheme to bill Blue Cross-Blue Shield for services not rendered. It can fairly be said that there is an important governmental interest in unearthing fraudulent schemes

by which certain individuals bilk insurers, for example, at the expense of the general public who in this era participate, of necessity, in the insurance plans.

On the other hand, there are the weighty considerations that underlie the formulation of Standard 504 and the state interests in physician-patient privilege. In apparent recognition of the significance of such considerations, the Government has agreed that the progress notes which it subpoenaed may be redacted so that only the name of the patient and the time of treatment are disclosed. This is a meaningful reduction in the scope of what is subpoenaed and goes far to meet the concerns that are reflected in the privilege. In light of the particular facts of the case at bar, it is concluded that the offer of redaction by the Government sufficiently limits the demand so that it does not run afoul of the psychotherapist-patient privilege.

Several factors contribute to this conclusion. The investigation is a criminal one implicating very significant governmental interests. Further, the patients, in the process of utilizing their insurance, disclose their identity to the insurer and therefore are not in a strong position now to complain that disclosure of identity — and not of substance of treatment — will deter utilization of psychotherapy.[1] It is also noteworthy that the grand jury proceedings are shrouded in secrecy and that whatever disclosure eventuates in accordance with this

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[1] This observation is made with full awareness of the fact that anonymity has been recognized as an important element of the therapeutic relationship. *E.g.*, *Lora* v. *Board of Education*, *supra* at 580-82; *see* 2 Weinstein's Evidence ¶ 504[05] at 504-23. *But cf. Flora* v. *Hamilton*, *supra* at 579 (suggesting that the contemporary public acceptance of mental illness indicates that disclosure of the fact of treatment may not be a deterrent to persons seeking treatment).

opinion will be subject to judicial supervision. Such safeguards are relevant to a determination of what disclosure can be compelled. *See Whalen* v. *Roe*, 429 U.S. 589, 601-02 (1977).

Accordingly, Petitioner will be required to comply with the subpoena, as narrowed by the concession of the Government at oral argument. Specifically, Petitioner will be permitted to redact his progress notes so that the Government is afforded access only to data reflecting the fact of and time of treatment. Such data would include information recorded on ledger cards and on progress notes from which substantive data recorded by the doctor has been deleted.

With respect to the specific method of production of the data, the following clarification is offered: because of the sensitive nature of the requested information, the Court will permit the Petitioner to complete the redaction process with the understanding that counsel will personally supervise it and will consult the Court with regard to any questions that might arise as to what should or should not be removed. Petitioner shall supply the Court with a sample file of progress notes, so that the Court is generally aware of the format of the notes. Petitioner shall also provide the Court with a proposed redacted copy of the sample progress notes for purposes of comparison. If the proposed method of redaction is proper, then it will be a model for completion of the redaction process in regard to the other sets of progress notes.

While this resolution disposes of the psychotherapist-patient privilege issue, the proposed disclosure must also be examined in light of the constitutional arguments raised by Petitioner. It is suggested that the disclosure of any information is so intrusive as to be an

impermissible infringement on constitutionally guarded privacy interests. The Court is not prepared to conclude that there exists any *general* privacy interest that is constitutionally secured. *Whalen* v. *Roe*, 429 U.S. 589, 607-09 (1977) (Stewart, J., concurring). Moreover, even if a privacy interest is rooted in the Constitution, it is not weighty enough to overcome the competing interest in disclosure of the information in a case like that at bar, where the intrusion is in connection with a specific case and is circumscribed by judicial supervision. *E.g.*, *Lora* v. *Board of Education*, *supra* at 573. Among the cases cited by Petitioner, *Hawaii Psychiatric Society* v. *Ariyoshi*, 481 F. Supp. 1028 (D. Hawaii 1979), is distinguishable in that it involved an attack on a state statute designed to aid Medicaid fraud investigators by permitting issuance of inspection warrants to search offices of medical providers.

Accordingly, the review of files, as limited by the Government's concession regarding the patient progress notes and this Court's procedure for redaction, does not amount to an impermissible infringement on constitutionally protected privacy interests, assuming, arguendo, the existence of constitutionally protected privacy interests. Given this conclusion, the Respondent's contention that Petitioner is without standing to raise the privacy issue need not be resolved.

Applying the law enunciated in the cases cited by Petitioner to the facts of the case at bar and remembering that the subpoena under review at present is directed not at that Petitioner individually but at the professional corporation,[2] it becomes clear that there are not grounds

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[2] The Government stated at oral argument, and Petitioner did not contest, that the subpoena is directed at the corporation. Further, at argument, Petitioner conceded that all billing is accomplished through the corporation.

on which the subpoena can be successfully attacked as violative of the fifth amendment privilege against self-incrimination. Petitioner's own citations show that a subpoena directed at the corporate entity cannot be avoided on fifth amendment grounds. For example, *In Re Grand Jury Proceedings United States*, 626 F.2d 1051 (1st Cir. 1980), includes this observation:

> Entirely to prohibit grand jury subpoena of business records in order to vindicate an individual's right not to have authentication evidence compelled would create an anomalous framework of constitutional protection of business records. Corporate records may be subpoenaed, even when incriminating to the custodian; so may personal business records when not in the possession of the owner; so may records of a sole practitioner when the records were prepared by a third party. Only the personal self-created business records in the possession of a sole proprietor or practitioner would enjoy a privilege against subpoena, although the records themselves are indistinguishable from business records that may be subpoenaed.

Id. at 1056 (citations omitted).

This conclusion is buttressed by other precedents. In *Bellis* v. *United States*, 417 U.S. 85 (1974), the Supreme Court upheld a contempt citation against an attorney who refused to obey a subpoena for law firm records possessed by the attorney and likely to incriminate him. Relying on *Bellis* and an earlier precedent, *United States* v. *White*, 322 U.S. 694 (1977), the Sixth Circuit Court of Appeals has limited the privilege against self incrimination in the context of records to situations where the records are "purely personal or wholly the

individual records of the [person asserting the privilege]." *In Re Grand Jury Proceedings*, 576 F.2d 703, 708 (6th Cir.), *cert. denied*, 439 U.S. 830 (1978). Thus, in the Sixth Circuit case, the court was not preoccupied with the formal label for the arrangement the witness had with his business associates. Even though there was no formal partnership, the court found "organized, institutional activity" which was sufficient to defeat a claim that the records were purely personal or wholly individual. *Id.* 706.

In the instant case, where there is a professional corporation which the Government has made the target of the subpoena, there is no need to resolve just what records might be subject to disclosure under a subpoena directed at Petitioner personally. The present inquiry goes only to the corporation which can invoke no fifth amendment privilege even though the material disclosed might incriminate an agent of the corporation. To contend that disclosure can be avoided by resort to a fifth amendment privilege is to overlook the clear law to the contrary.

Having concluded that there is no constitutional bar to the disclosure described in connection with the analysis of the psychotherapist-patient privilege issue, the Court finds that Petitioner must answer the subpoena served on the professional corporation. Records will be subject to redaction in the manner discussed above.

It Is So Ordered.

/s/ Patricia J. Boyle
United States District Judge

Date: Feb 26 1981
Detroit, Michigan

(Certification Omitted)